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No. 84-958

Office Supreme Court, U.S.
FILED
JAN 19 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

**AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,**

*Cross-Petitioner,*

v.

**LEE F. HIGMAN, et al., GERRY W. MONROE, et al., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED AIR LINES, INC.,**

*Respondents.*

**On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR RESPONDENTS LEE F. HIGMAN, et al., AND GERRY W. MONROE, et al. IN OPPOSITION

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January 1985

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether, in light of this Court's opinion in *TWA v. Thurston*, the "bona fide seniority system" defense under 29 U.S.C. §623(f)(2) is foreclosed as a matter of law.

2. Whether ALPA is barred from asserting that age-under-sixty is a bona fide occupational qualification for the position of flight engineer.

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Respondents Lee F. Higman, *et al.* and Gerry W. Monroe, *et al.* (the *Higman-Monroe* respondents) respectfully pray that the Conditional Cross-Petition of the Air Line Pilots Association, International (ALPA) be denied.

## COUNTERSTATEMENT OF THE CASE

The *Higman-Monroe* respondents respectfully refer to the Statements of the Case presented in their Brief in

Opposition to United Air Lines, Inc.'s (United) Petition for Certiorari (No. 84-774) and in respondents' Conditional Cross-Petition (No. 84-916).[1]

## REASONS THE WRIT SHOULD NOT BE GRANTED

1. ALPA's contention that United's actions were lawful under the "bona fide seniority system" exception to the Age Discrimination in Employment Act, 29 U.S.C. §623(f)(2), is foreclosed by the Court's recent decision in *TWA v. Thurston*, 53 U.S.L.W. 4024 (January 8, 1985). There the Court held that TWA's practice of refusing to allow Captains to "bump" to flight engineer positions at age sixty while allowing younger pilots to do so, was "discriminatory on its face." 53 U.S.L.W. at 4026. The Court also ruled that the bona fide seniority system defense was unavailable, noting that "any seniority system that includes the challenged practice is not 'bona fide' under the statute." 53 U.S.L.W. at 4027.

The Seventh Circuit's analysis tracks that of this Court in *Thurston*. Stating that the *Higman* respondents "are entitled to the same treatment as that accorded to younger first officers and captains who can no longer serve in those capacities," (A 20) the court held that respondents' evidence was "sufficient to support a finding that United administered the seniority system in a

[1] These briefs are cited herein as "R.Opp." and "R.Pet.," respectively. The Court of Appeals' opinion, reprinted in the appendix to United's Petition, is cited as "A ____."

discriminatory manner" (A 22). It found that, contrary to United's claim that downgrades were allowed in limited circumstances, it had permitted many pilots to downgrade, including some who would be unable to return to their former positions (A 20-22; *see* R.Opp. at 4-5). Based on these findings, the court held that judgment n.o.v. was properly denied (A 22).

The Court of Appeals did not review the district court's refusal to allow United to assert a claim under ADEA Section 4(f)(2), 29 U.S.C. §623(f)(2). That defense, however, is unavailable, since a seniority system may not "require or permit" the involuntary retirement of persons under seventy because of age. *Thurston*, 53 U.S.L.W. at 4027; *see* R.Opp. at 6-7. Thus, *Thurston* disposes of ALPA's and United's contentions regarding the seniority system, and requires the dismissal of both petitions.[2]

2. ALPA and United contended in the Court of Appeals that the jury should have been instructed in accordance with the bona fide occupational qualification test set forth in *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983). The Court of Appeals agreed and remanded for retrial.[3] The *Orzel* standard, which follows the test first set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), was opposed by ALPA and United in the district

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[2] Further, as a party to the *Thurston* litigation, ALPA is collaterally estopped from presenting the same legal arguments decided adversely to it in that action. *Montana v. United States*, 440 U.S. 147, 153 (1979). *See Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33, 37-38 (C.D. Cal. 1982).

[3] The *Higman-Monroe* respondents have sought review of this aspect of the Court of Appeals' decision, in the event that United's petition is granted. *See* R.Pet. at 9-11.

court. There, defendants embraced the "rational basis to believe" test which ALPA now seeks to resurrect. ALPA may not renew a position before this Court which it abandoned in the Court of Appeals. *Cf. Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967) (Supreme Court will not consider issues not presented to the Court of Appeals).[4]

Furthermore, ALPA should be estopped from contending that an age-sixty cutoff is necessary to safety. It did not seek review of the Second Circuit's contrary finding in *ALPA v. TWA*, which was consolidated with *Thurston*. *See* 713 F.2d at 949-51;[5] *see also* 53 U.S.L.W. at 4027 and n.18. This Court, moreover, rejected ALPA's position that a BFOQ may be established for the flight engineer by analogy to the FAA limitation on service by Captains. 53 U.S.L.W. at 4027; *see* 713 F.2d at 953-54.

In any event, the question of the proper standard for establishing a BFOQ for flight engineers is before this Court in *Western Air Lines, Inc. v. Criswell*, No. 83-1545

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[4] ALPA presents an out-of-context quote to suggest that the Seventh Circuit held that a BFOQ requires no more than a showing that an incapacitated flight engineer "would endanger the flight." ALPA Pet. at 20. The opinion clearly adopts the entire *Orzel-Tamiami* test (A 7-8) and directs the district court to apply it at retrial (A 11).

[5] On the same day that TWA announced that it would employ flight engineers over sixty, ALPA sued, seeking, *inter alia*, a declaratory judgment that age-less-than-sixty is a BFOQ for flight engineers. The district court granted summary judgment for TWA, and ALPA appealed. The Second Circuit held that it lacked jurisdiction over this claim, stating "We will not strain to expand our discretionary jurisdiction to issue a declaratory judgment in aid of this narrow BFOQ defense, particularly absent any showing of legitimate safety concerns." 713 F.2d at 951. ALPA did not petition this Court for review of its own case.

(oral argument held January 14, 1985). ALPA has participated in that action as *amicus curiae*, taking the same position urged in its Cross-Petition (*see* ALPA Pet. at 20-21 n.8). There thus is no need for the Court either to grant ALPA's Cross-Petition or to hold it in abeyance, since the decision in *Western* will be applied by the district court at the retrial of this action.

## CONCLUSION

For the foregoing reasons, the *Higman-Monroe* respondents respectfully submit that ALPA's Conditional Cross-Petition be denied.

Respectfully submitted,

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